UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

GYPSIE JONES,

Plaintiff,

v.

SEARS ROEBUCK & CO., dba SEARS #61778,

Defendant.

2:05-cv-0535-MCE-KJM

MEMORANDUM AND ORDER

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Plaintiff Gypsie Jones ("Plaintiff") filed the instant action against Defendant Sears Roebuck, Inc. ("Defendant"), alleging that Sears Roebuck #6178, located at 1604 Arden Way, Sacramento, California ("the Store"), is in violation of both the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12181 et seq. and California's Unruh Civil Rights Act ("Unruh Act"), Cal. Civil Code §§ 51 et seq. Plaintiff seeks damages pursuant to the Unruh Act and injunctive relief pursuant to the ADA.

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The case is now before the Court on Defendant's Motion to Dismiss for lack of subject matter jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(1).[1] As set forth below, the Court finds Plaintiff's ADA claim is not ripe for adjudication. Subject matter jurisdiction over this case is therefore lacking.[2] Defendant's Motion to Dismiss on that basis is accordingly granted.[3]

BACKGROUND

Plaintiff is a paraplegic who requires the use of a wheelchair for mobility. Plaintiff visited the Store on May 17, 2004, during a visit to Sacramento. While in the Store, she alleges she encountered architectural barriers that made it difficult or impossible for her to have full and equal access to the goods and services provided by Defendant.

At the time Plaintiff filed her complaint, she lived 156 miles away from the Store, in Cottonwood, California (Dep. Of Gypsie Jones ("Jones Dep.") at 9:13-21, Ex. A of Dec. of Marc B. Koenigsberg).

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[1]All further references to "Rule" or "Rules" are to the Federal Rules of Civil Procedure unless otherwise noted.

[2]Because the Court finds Plaintiff's ADA claim lacks subject matter jurisdiction, it is unnecessary to address Defendant's alternative Motion for Summary Judgment pursuant to Rule 56.

[3]Because oral argument would not be of material assistance, this matter was determined to be suitable for decision without oral argument. L.R. 78-230(h).

In November 2004, Plaintiff moved to Anderson, California, and now lives 157 miles away from the Store (Jones Dep. 9:9-21).[4] Plaintiff visits the Sacramento area four to five times a year, most frequently to see her grandfather (Jones Dep. at 24:14-18). Prior to her visit on May 17, 2004, Plaintiff had not visited the Store in seventeen years[5]. Plaintiff shops at other Sears stores occasionally; she goes to the Redding Sears once a year (Jones Dep. at 31:21-23), and also sporadically patronizes other northern California Sears facilities.

STANDARD

In moving to dismiss for lack of subject matter jurisdiction pursuant to Rule 12 (b)(1), the challenging party may either make a "facial attack" on the allegations of jurisdiction contained in the complaint or can instead take issue with subject matter jurisdiction on a factual basis ("factual attack").

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[4] In addition to the testimony provided by Plaintiff in her deposition with respect to distances from her home to various stores operated by Defendant, Defendant has also requested, pursuant to Federal Rule of Evidence 201, that the Court judicially notice the distance between Plaintiff's residence and various Sears facilities located in Sacramento, Red Bluff, and Redding. Those requests were unopposed and are hereby granted.

[5] According to Plaintiff's deposition, prior to her May 17, 2004 visit, she had not visited the Store since "age 17" (36:8-18). In both Defendant's Memorandum of Points and Authority and Statement of Undisputed Facts, Defendant claims Plaintiff's visit on May 17, 2004 was her first in seventeen years. Plaintiff has not controverted Defendant's statement, consequently the Court accepts Defendant's statement as true.

Thornhill Publishing Co. v. General Tel. & Elect. Corp., 594 F.2d 730, 733 (9th Cir. 1979); Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977). If the motion constitutes a facial attack, the Court must consider the factual allegations of the complaint to be true. Williamson v. Tucker, 645 F.2d 404, 412 (5th Cir. 1981); Mortensen, 549 F.2d at 891. If the motion constitutes a factual attack, however, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." Thornhill, 594 F.2d at 733 (quoting Mortensen, 549 F.2d at 891). The Court may itself review any evidence, including declarations and testimony, in making its decision in that regard. McCarthy v. U.S., 850 F.2d 558, 560 (9th Cir. 1988). The instant motion presents a factual jurisdictional attack.

If the Court grants a motion to dismiss a complaint, it must then decide whether to grant leave to amend. Generally, leave to amend should be denied only if it is clear that the deficiencies of the complaint cannot be cured by amendment. Broughton v. Cutter Labs., 622 F.2d 458, 460 (9th Cir. 1980).

ANALYSIS

Defendant contends Plaintiff lacks standing, as required by Article III of The United States Constitution, to assert a proper ADA claim under the circumstances of this case.

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Specifically, Defendant argues Plaintiff failed to establish the necessary injury in fact as required by Article III. In the absence of a cognizable federal claim predicated on the ADA, Defendant also urges that the Court decline to exercise supplemental jurisdiction over the Plaintiff's state law claims and dismiss the case in its entirety.

To satisfy Article III standing, a plaintiff must show that: (1) she has suffered an "injury in fact" that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180-181 (2000).

The injury in fact prong is generally considered the "principal limitation imposed by Article III." Grand Lodge of Fraternal Order of Police v. Ashcroft, 185 F.Supp.2d 9, 14 (D.C. Cir. 2001) (citations omitted). To satisfy the injury in fact requirement under the ADA for injunctive relief, a plaintiff must "demonstrate that they themselves face a real and immediate threat of future harm." Parr v. L & L Drive-Inn Rest., 96 F.Supp.2d 1065, 1079 (Haw. 2000). Plaintiff can achieve this by "showing he has encountered...barriers at a place of public accommodation and he intends to return to the public accommodation in the future." Molski v. Arby's Huntington Beach, 359 F.Supp.2d 938, 946 (C.D. Cal. 2005) (citing Pickern v. Holiday Quality Foods, Inc., 293 F.3d 1133, 1137-1138 (9th Cir. 2002)).

The issue of barriers is not in dispute. Instead, Defendant simply challenges Plaintiff's likelihood of returning to the Store, in arguing that she lacks standing to assert any ADA claim against the particular Store in question. Courts have commonly applied four factors when determining if a plaintiff has established a likelihood of return sufficient to confer standing: (1)the proximity of the place of public accommodation to plaintiff's residence; (2) plaintiff's past patronage of defendant's business; (3) the definitiveness of plaintiff's plans of return; and (4) the plaintiff's frequency of travel near the business in question. Arby's Huntington Beach, 359 F.Supp.2d at 947 (citing D'Lil v. Best Western Encina, 2001 U.S. Dist. Lexis 23309, 2001 WL 1825832 at *3). These factors will now be addressed in turn.

A. Proximity of Public Accommodation

"As the distance between the plaintiff's residence and the public accommodation increases, the likelihood of future harm decreases." Molski v. Mandarin Touch Rest., 358 F.Supp.2d 1042, 1045 (C.D. Cal. 2005); see also Wilson v. Costco Wholesale Corp., 426 F.Supp.2d 1115, 1121 (S.D. Cal. 2006). Courts have consistently maintained that a distance over 100 miles weighs against finding a reasonable likelihood of future harm.

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See De Lil v. El Torito Rest., 1997 U.S. Dist LEXIS 22788, No. C-93-3900 (N.D. Cal. 1997) (holding the plaintiff failed to establish a likelihood of future harm, in part because he lived over 100 miles from defendant restaurant); Molski v. Kahn Winery, 2005 US Dist. LEXIS 41768 (2005) (concluding the plaintiff unsuccessfully established a likelihood of future harm, in part because he lived 104 miles from the defendant winery); Harris v. Del Taco, 396 F.Supp.2d 1107, 1113 (C.D. Cal. 2005)(finding the plaintiff lacked standing to assert a claim for injunctive relief, partly because he lived 573 miles away from the defendant restaurant).

In the present matter, Plaintiff lives 157 miles away from the Store. The distance between Plaintiff's residence and the Store is considerable and weighs against finding a likelihood of future harm. The Court is unpersuaded by Plaintiff's argument against a 100 mile threshold based on "today's car-based economy" (Pl.'s Resp. 5:27-28). Plaintiff's argument lacks authority, and fails to address Plaintiff's likelihood of returning to the Store in any event.

B. Past Patronage

"The lack of a history of past patronage seems to negate the possibility of future injury at that particular location." Kahn Winery, 2005 U.S. Dist. LEXIS 41768. In addition to subsequently visiting the defendant's facility, a history of patronage can be established by visiting other stores in the chain or showing a preference for the specific chain.

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Pickern, 293 F.3d 113 (concluding the plaintiff established future harm sufficient to sue a Holiday Store located 70 miles from his residence, by both frequently shopping at the Holiday Store in his hometown and showing a genuine preference for the chain).

Prior to her visit on May 17, 2004, Plaintiff visited the Store in question once before, some seventeen years previously. The Court acknowledges Plaintiff has visited the Store in the past. One visit many years ago, however, is inadequate to create a history of patronage that increases the likelihood of future harm. Plaintiff's visit, as a teenager, to the Store provides the Court no insight on her likelihood of returning.

Defendant in this case is a chain with stores throughout California. Unlike the Pickern plaintiff, Plaintiff has failed to show a general preference for the Defendant's chain. According to Plaintiff, she visits the Sears in Redding, California, located only thirteen miles away from her home only about once a year, and last visited the Sears in Red Bluff, California a "couple of years ago" (Jones Dep. 31:20). The Plaintiff has displayed no regular pattern of patronizing Sears or a specific preference for the franchise. Consequently, the Court finds no history of past patronage supporting Plaintiff's likelihood of future harm.

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C. Plans to Return

Standing cannot be established by a plaintiff asserting a "mere profession of an intent, some day, to return." Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992)(holding plaintiffs' general intent of returning insufficient to confer standing, without a more concrete plan of return). "Where a plaintiff lacks 'concrete plans to return, the Court must satisfy itself that a plaintiff's professed intent to return is sincere and supported by the facts.'" Kahn Winery, 2005 Dist. Lexis 41768, at 9(citing Parr, 96 F.Supp.2d 1065, 1079). Courts have frequently considered a plaintiff's litigation history in determining the sincerity of their professed intent to return. Id.; see also Wilson, 426 F.Supp.2d at 1123; Mandarin Touch Rest., 385 F.Supp.2d at 1046-47.

In the current matter, Plaintiff admits she has a general intent of returning to the Store, but has no specific plans.[6] Under the Lujan standard, Plaintiff's general intent is insufficient to confer standing.

In rebuttal, Plaintiff contends that specific plans are unnecessary, because visiting the Store is not the type of event that requires advance planning. Plaintiff argues that the nature of visiting the Store is more accurately compared to visiting a fast food restaurant, as in Parr.

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[6]In her deposition Plaintiff stated, "...I don't have any plans. But I do want to go back there eventually, if not to buy something, at least to make sure they're getting all of the barriers taken care of" (Jones Dep. 87:5-8).

In Parr, the court categorized visiting a fast food restaurant as "not the sort of event that requires advance planning or the need for a reservation," instead noting that "[f]ast food patrons visit such restaurants at the spur of the moment." 96 F.Supp.2d at 1079. Plaintiff argues that visiting the Store, like patronizing a fast food restaurant, is a "spur of the moment" activity that does not require advance planning.

The Court agrees that visiting the Store does not require premeditation; therefore specific plans are not dispositive in determining whether Plaintiff is likely to return to the Store. Instead, in the present matter, the Court must look to the sincerity and credibility of Plaintiff's professed general intent to return to the Store. Two key facts cause the Court to question Plaintiff's intent to return to the Store.

First, Plaintiff has established a recent and voluminous history of litigation. The Plaintiff has filed 114 lawsuits in the last four years in Federal District Courts in California.[7] Particularly, the Plaintiff has filed thirty-nine cases in the Eastern District, nine heard specifically before this Court. Second, Plaintiff has herself admitted to returning to only 40-50 percent of the facilities she has previously sued.[8] This is an unconvincing track record, demonstrating that Plaintiff returns to facilities she sues no more the half of the time.

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[7]Pursuant to Federal Rule of Evidence 201, the Court takes judicial notice of Plaintiff's prior litigation history in Federal court, as discovered through its own investigation.

[8]In her deposition Plaintiff stated, "I'm going to estimate that I've been back to about 40 to 50 percent of" facilities after lawsuits against them ended (Jones Dep. 29:6-7).

Plaintiff's unsatisfactory rate of return to businesses she has previously sued in combination with her current and extensive litigation history significantly cripples her credibility and undermines the sincerity of her professed intent to return to the Store.

D. Frequency of Travel Near the Store

Plaintiff travels to the Sacramento area four to five times a year, most commonly to see her grandfather. Plaintiff's frequency of visiting the Sacramento area is comparable to the plaintiff's propensity of travel in Wilson. In that case, the court found the plaintiff's travel to the San Diego area some three to four times a year was insufficient to confer standing. 426 F.Supp.2d at 1119. On the other hand, in Parr and Pickern, cases where plaintiffs' habits were found sufficient to confer standing, both plaintiffs traveled frequently to the area where defendants' facilities were located. In Pickern the plaintiff visited his grandmother weekly, and in Parr the defendant restaurant was on plaintiff's regular bus route. 293 F.3d at 1135; 96 F.Supp.2d at 1080. In contrast, Plaintiff's frequency of travel near the Store is far more diluted than was the case for the plaintiffs in either Pickern or Parr. Consequently, the Court finds Plaintiff's frequency of travel to the Sacramento area insufficient to increase Plaintiff's likelihood of returning to the Store.

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CONCLUSION

As demonstrated above, all four factors weigh strongly against finding a likelihood of Plaintiff returning to the Store. Accordingly, the Court holds that Plaintiff lacks standing to pursue injunctive relief under the ADA against Defendant, and hereby GRANTS Defendant's Motion to Dismiss Plaintiff's ADA claim with prejudice, since the Court does not believe the deficiencies of that claim can be rectified through amendment. Absent a viable federal claim, the Court declines to exercise supplemental jurisdiction over Plaintiff's remaining State law claims and dismisses those claims without prejudice. The Clerk of the Court is hereby directed to close the file.

DATED: November 28, 2006

MORRISON C. ENGLAND, JR
UNITED STATES DISTRICT JUDGE